

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Paxson Portland License, Inc.)	
)	CSR 5909-M
v.)	
)	
Time Warner Entertainment Company, L.P.)	
)	
For Carriage of WMPX-TV, Waterville, Maine, in)	
Berlin, Gorham, Lancaster, Dalton, Groveton,)	
Northumberland, and Whitefield, New Hampshire)	
)	
In the Matter of:)	
)	CSR-5928-A
Time Warner Entertainment Company, L.P.)	
)	
Petition for Modification of Television Market of)	
Television Station WMPX-TV, Waterville Maine)	

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 2002

Released: September 27, 2002

By the Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Paxson Portland License, Inc. ("Paxson"), licensee of television station WMPX-TV ("WMPX"), Waterville, Maine, filed the captioned complaint for carriage of WMPX-TV by the Time Warner Entertainment Company, L.P. (Time Warner) cable systems serving Berlin and Lancaster New Hampshire.¹ Time Warner filed an answer to the complaint as well as a petition to modify the market of WMPX-TV by excluding the TWC Communities from the station's market. Paxson did not file a reply nor did it oppose Time Warner's modification petition. Because the issues raised by the complaint and the petition are inter-related and involve the same parties, both matters are considered here. We grant Time Warner's petition and dismiss Paxson's complaint for carriage as moot.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and the rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992* ("*Must Carry Order*"), commercial television broadcast stations are entitled to assert mandatory

¹ Time Warner operates two cable systems at issue here, one that serves Berlin and Gorham, New Hampshire and another that serves Lancaster, Dalton, Groveton, Northumberland, and Whitefield, New Hampshire. The communities are referred to collectively herein as the TWC Communities.

carriage rights on cable systems located within the station's market.² A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.³ A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.⁴

3. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.⁵

In considering such requests, the 1992 Cable Act provides that:

the Commission shall afford particular attention to the value of localism by taking into account such factors as –

- (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
- (II) whether the television station provides coverage or other local service to such community;
- (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;
- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁶

² 8 FCC Rcd 2965, 2976-2977 (1993).

³ Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. §534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. *See Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

⁴ For a more complete description of how counties are allocated, *see* Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁵ 47 U.S.C. §534(h)(1)(C).

⁶ *Id.*

The legislative history of the provision states that:

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.⁷

In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.⁸

4. In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modification petitions that requires the following evidence be submitted:

(1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(2) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relating to the service areas.

Note to paragraph [2]: Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.⁹

⁷ H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁸ *Must Carry Order*, 8 FCC Rcd at 2977 n. 139.

⁹ The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographical features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

- (3) Available data on shopping and labor patterns in the local market.
- (4) Television station programming information derived from station logs or the local edition of the television guide.
- (5) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.
- (6) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.¹⁰

Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

5. With respect to deletions of communities from a station's market, the legislative history of this provision states that:

The provisions of [this subsection] reflect a recognition that the Commission may conclude that a community within a station's [DMA] may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Committee's intention that these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.¹¹

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.¹² The rules further provide, in accordance with the requirements of the 1992

¹⁰47 C.F.R. §76.59(b)

¹¹ H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

¹² 8 FCC Rcd 15 2977 n. 139.

Cable Act, that a station not be deleted from carriage during the pendency of a modification request.¹³

III. DISCUSSION

A. The Market Modification Petition

7. Station WMPX is located in the Portland-Auburn DMA as are the TWC Communities. Time Warner requests the Commission to modify WMPX-TV's television market by excluding the TWC Communities.¹⁴ In support of this request, Time Warner asserts that WMPX-TV historically has not been carried on the cable system,¹⁵ is geographically distant from the cable system,¹⁶ does not provide Grade B signal coverage of the Communities,¹⁷ does not broadcast programming of specific interest to residents of the Communities,¹⁸ and achieves no measurable viewing audience in Coos County where the cable systems are located.¹⁹ Time Warner states that the distance from Waterville, Maine, WMPX's community of license, to the TWC Communities ranges between 76 and 95 miles and that the station's Grade B coverage contour does not extend to any place in New Hampshire and thus does not reach any of the TWC Communities.²⁰ Further, Time Warner states that WMPX-TV has no locally produced programming on its schedule and the station is not listed in local print sources of television station listings.²¹ In addition, Time Warner states that it does not carry other stations in the Portland-Auburn DMA and that other regional stations it does carry offer local news and a wide range of sports and public affairs programs.²²

8. Because Paxson has not opposed Time Warner's petition, we base our decision on the record as presented by Time Warner. Section 614(h)(1)(C) of the Communications Act requires the Commission to include additional communities within a television station's market, or exclude communities from a station's market, to better effectuate the purposes of the statutory provision, which is ensuring that a television station is carried in the areas which it serves and which form its economic market. Section 614(h)(1)(C)(i) specifically and unambiguously directs the Commission, in considering requests for market modification, to afford particular attention to the value of localism by taking such matters into account. Clearly, too, the must carry rules "were not intended to transform an otherwise local station into a regional 'super station' that must be automatically carried in every single community in [a DMA]...."²³ WMPX-TV is a commercial television station licensed to Waterville, Maine, within the

¹³ *Must Carry Order*, 8 FCC Rcd at 2977.

¹⁴ Time Warner cites a recent Media Bureau order that modified WMPX-TV's market to remove three communities in Maine and asserts that its instant request is consistent with the prior order's conclusions. Petition at 2. See *Metrocast Cablevision of New Hampshire, LLC*, (CSR-5864), DA 02-1368 (MB, rel. June 12, 2002).

¹⁵ Petition at 6.

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 8.

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 10.

²⁰ *Id.* at 8.

²¹ *Id.* at 9.

²² *Id.* at 10.

²³ See *Time Warner Entertainment-Advance Newhouse Partnership*, 11 FCC Rcd 6541 (CSB 1996).

Portland-Auburn DMA. Waterville is located between 76 and 95 miles from the TWC Communities. Although these Communities are also in the Portland-Auburn DMA, WMPX-TV has no history of cable carriage in the Communities, despite being in operation since April of 1999. The station has no measurable audience viewership and the station does not place a grade B signal contour over the Communities at issue.

9. Another factor considered in market deletion cases is the availability of other broadcasters in the market. Section 614(h)(1)(C)(ii)(III) specifically provides that, in considering market modification requests, the Commission shall take into account whether a cable operator serving the communities at issue carries other stations that provide “news coverage of issues of concern to such community or provide[s] carriage or coverage of sporting and other events of interest to the community”.²⁴ We have also stated, and reiterate here, that where a cable operator is seeking to delete, as opposed to add, a station's mandatory carriage rights in certain communities within its DMA, and the station is providing only minimal local service to those communities, we will give weight to the fact that other stations are providing local coverage.²⁵ Carriage of other local stations may be used as evidence supporting a cable operator's deletion request when additional evidence shows the communities at issue to be outside of the station's market.²⁶ In the present case, Time Warner carries other stations serving the TWC Communities with local programming. Finally, we find that WMPX-TV has no viewing audience in the Communities served by Time Warner.

10. After considering the statutory factors as well as Paxson's lack of opposition to the Petition, we conclude that the record demonstrates that the requested exclusion of the communities served by Time Warner's cable systems from WMPX-TV's television market will better effectuate the must carry statutory provisions' purpose of ensuring that television stations are carried in areas which they serve and which form their economic market. We conclude, based on the above, that WMPX-TV's economic market does not include, and that it does not serve, the Communities at issue. We therefore grant Time Warner's petition.

B. The Must Carry Complaint

11. In view of our decision regarding the market modification request, the arguments raised by Paxson and Time Warner in reference to Paxson's must carry complaint are moot. As such, Paxson's must carry complaint is dismissed.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended (47 U.S.C. §534(h) and §76.59), that the petition for special relief filed on behalf of Time Warner **IS GRANTED**, and the communities of Berlin, Gorham, Lancaster, Dalton, Groveton, Northumberland, and Whitefield, New Hampshire **ARE HEREBY EXCLUDED** from the television market of television station WMPX-TV, Waterville, Maine.

²⁴ See 47 U.S.C. § 534(h)(1)(C)(ii)(III).

²⁵ See e.g., *Marcus Cable Associates, LLC*, 14 FCC Rcd 1, 8 (CSB 1998).

²⁶ *Id.*

13. **IT IS FURTHER ORDERED** that the complaint of Paxson Portland License, Inc. for carriage of WMPX-TV in the communities of Berlin, Gorham, Lancaster, Dalton, Groveton, Northumberland and Whitefield, New Hampshire, **IS DISMISSED**.

14. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.²⁷

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Murphy
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²⁷47 C.F.R. §0.283.